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Agency Independence After PCAOB

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INTRODUCTION

Many administrative agencies possess functions characteristic of all three branches of government—legislative, executive, and judicial. This "combination of functions" within administrative agencies has piqued the interest of students of separation of powers, but the Supreme Court has not seriously questioned it.[1] The Supreme Court's most important separation-of-powers decision of the last term, *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*,[2] changed that. The *PCAOB* decision linked the constitutionality of good-cause removal provisions under separation of powers to separation of functions within the agency.

On first reading, the *PCAOB* decision has little to say about separation of agency functions. The primary issue was the validity of a provision that limited removal of the members of the Public Company Accounting Oversight Board (the Board) by the Securities Exchange Commission (SEC) to good cause.[3] The Court struck down the Board's good-cause removal protection, relying primarily on the fact that it constituted the second layer of removal protection from the President, as

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1 *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1556 (1991) ("[T]he Supreme Court has never seriously questioned the validity of the commingling of legislative, executive, and judicial functions in [the administrative agency] context."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994) ("The post-New Deal Supreme Court has never seriously questioned the constitutionality of this combination of functions in agencies."); *see also* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.9, at 889 ("[T]he Court has never held an adjudicatory regime unconstitutional on the basis that the functions were insufficiently separated."); David P. Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19, 19-20 (raising the consistency of consolidated agency functions with separation of powers).

2 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (*PCAOB*), 130 S. Ct. 3138 (2010).

3 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (2006).

the SEC itself is understood to be protected from removal under a good-cause standard.[4]

But the dual layer of removal protection was not what decided the case. If it were, the *PCAOB* decision would have swept aside the constitutional foundation for good-cause protections for the many adjudicators operating in independent agencies who also have two layers of good-cause protection, a conclusion the *PCAOB* Court resists.[5] The question, then, is what distinguished the Board's removal protections from the removal protections of officers who only have adjudicative functions (i.e., dedicated adjudicators) in independent agencies. The answer, I argue in this Essay, is the Board's combination of functions. The Board possesses rulemaking, enforcement, and adjudicative functions. This combination of functions sets the Board's removal protections apart from those of dedicated adjudicators within independent agencies whose removal protections the Court sought to preserve, and furnishes the key ground of the decision. *PCAOB*'s principle, then, is that the consistency of good-cause removal protections with separation of powers depends in part on the combination of functions of the officials whose tenure those provisions protect. At base, this principle reflects a significant reversal of the constitutional baseline for assessing removal protections: Whereas formerly adjudicative functions provided a sufficient ground for upholding good-cause removal protections for an agency with a combination of functions, under *PCAOB*'s principle, enforcement and policymaking functions take primacy over adjudicative functions, and provide a sufficient ground for requiring at-will removal power.

That notable departure puts the nose of separation of powers under the tent of combination of functions within the agency. It also shapes the implications of the decision. Viewed in this light, the critical question that the *PCAOB* decision presents is not, as Justice Breyer warned in his dissent,[6] the fate of officials within independent agencies protected by a dual layer of removal protections. *PCAOB* has clear implications there. The question is how far *PCAOB*'s invalidation of good-cause removal protections for officials with combined functions will extend (upward) in the evaluation of single-layer good-cause removal protections. While there are certainly grounds to restrict the decision agencies from operating under dual-layer good-cause restrictions, the logic of *PCAOB*'s separation-of-agency-functions principle has no necessary limitation to second-tier removal protections. Taken to its full extension, it redraws the constitutional grounding of agency independence. In particular, it would preserve the constitutional

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[4] *See PCAOB*, 130 S. Ct. at 3149, 3151-60.

[5] *See id.* at 3160 n.10.

[6] *See id.* at 3180-82 (Breyer, J., dissenting).

foundation for good-cause removal protections for dedicated adjudicators, but sweep aside that foundation for officials with more than adjudicative functions.

The appeal of that significant redrawing depends in part on the extent to which one views adjudication as simply a means of policy execution. If it is, the extension of *PCAOB*'s principle would have welcome consequences because it would help to restore a lost accountability for adjudicative decisions in agencies with a combination of functions. If it is not, *PCAOB*'s principle would have the unwelcome effect of inviting officials in combined function agencies to see adjudication as merely another mode of policy implementation and forum for accountability to their political superiors.

This Essay is organized as follows. Part I briefly notes how little the constitutional law of separation of powers has had to say about the separation of functions within administrative agencies. It then provides a brief diagnosis of why this is the case despite the longstanding commitment to preventing the consolidation of government powers in a single institution or person. Part II turns to *PCAOB*. It recounts that under well-established separation-of-powers law, the agency's exercise of adjudicative functions has been a sufficient reason for validating good-cause removal protections, even where the agency also possesses enforcement and rulemaking powers. Given that the Board has adjudicative functions, the question is how the Court accommodates this principle. The *PCAOB* Court's response is to uphold removal protections for officials who exercise only adjudicative functions and to deny it to those who also have rulemaking and enforcement powers. Part III considers how far the logic of *PCAOB*'s principle extends beyond *PCAOB* facts to the reevaluation of single-layer removal protections and agency structure more generally.

This Essay, like others in this Festschrift, is written to celebrate Paul Verkuil—his contributions in administrative law and to his many colleagues, as well as his fitting appointment as Chairman of the Administrative Conference of the United States. As I hope to show, then-professor Paul Verkuil's elucidation of the relationship between administrative functions and the grounds for good-cause removal protection remains all the more central to statutory design and constitutional law in the wake of the Supreme Court's decision in *PCAOB*.

I. THE SILENCE OF SEPARATION OF POWERS AS TO THE SEPARATION OF FUNCTIONS WITHIN AGENCIES

One traditional concern of separation of powers is associating particular types of power with particular government actors.[7] Part of the motivation for this power-to-branch matching is to avoid a consolidation of the powers of lawmaker, judge, and prosecutor in a single set of hands. James Madison's famous statement in *Federalist No. 47* is a touchstone for this anti-consolidation principle: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[8]

Administrative agencies, it is widely remarked, possess and combine the powers of lawmaking, enforcement, and adjudication. It would be hard to resist (or to improve on) Professor Gary Lawson's compact statement of how the Federal Trade Commission combines these functions:

> The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous administrative law judge. If the Commission chooses to adjudicate before an administrative law judge and the decision is adverse to the Commission, the Commission can appeal to the Commission.[9]

A. *Separation of Powers' Silence*

Separation-of-powers law has been silent on the consolidation of functions within agencies. The Supreme Court has not held that

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[7] *See, e.g.*, Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 858 (1990) (noting this concern); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 650 (2001) (same).

[8] THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

[9] Lawson, *supra* note 1, at 1248.

combination of functions within the agency violates separation of powers.[10] Despite Madison's worry about consolidation of different types of power in a single set of hands, it is not difficult to see why separation of functions within agencies has fallen outside of separation-of-powers scrutiny. The tools through which separation of powers implements this anti-consolidation principle provide few points of connection to the combination of functions within administrative agencies.

To see this, first consider approaches to separation-of-powers doctrine which emphasize matching each branch with a particular type of power.[11] From this perspective, there should be no reason for separation of powers to include a doctrine of separation of functions internal to the agency. The reason is that, on this view, the task of separation of powers is to make sure that the actors of each branch perform only their branch's characteristic functions. The matching requirement would ensure that agency actors perform only executive functions. As a result, it would eliminate any need for separation of powers to police separation of functions *within* an agency because the agency would be, by the operation of the matching requirement, exercising only executive power.[12] The Supreme Court has suggested that agency rulemaking,[13] agency adjudication,[14] and enforcement are exercises of executive power.[15] Once agency functions are so classified, the matching approach to separation of powers provides no independent constraint on the combination of these functions. Indeed, it

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[10] Separation of functions within administrative agencies is just one type of division of power and organizational structure internal to the executive branch. This division comes within the class of internal separation of powers, a class of constraints which the Supreme Court has been generally reluctant to enforce through the constitutional law of separation of powers. *See* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 429-34, 453-57 (2009) (characterizing separation of functions along with removal provisions, internal personnel measures, watchdogs, staff organization and division, and procedural constraints as internal separation of powers for the executive branch and explaining, as well as questioning, the Court's reluctance to enforce these internal constraints through constitution law).

[11] *See* Lawson, *supra* note 7, at 859-60 (describing formalism in separation of powers as committed to view that each branch must exercise its correlative power and no others); Magill, *supra* note 7, at 650 (providing an account of this approach to separation of powers).

[12] *See* Metzger, *supra* note 10, at 427 (noting that the concept of separation of powers internal to each branch is, for formalists, a contradiction in terms).

[13] *See* INS v. Chadha, 462 U.S. 919, 953 (1983) (treating agency rulemaking as executive); *cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment) (suggesting that the Court should admit that agency rulemaking authority is "legislative power").

[14] *See, e.g.*, Pan. Ref. Co. v. Ryan, 293 U.S. 388, 427-28 (1935) (characterizing adjudicative determinations of the ICC and other agencies as carrying out an executive duty); *see also Chadha*, 462 U.S. at 966 n.10 (Powell, J., concurring in the judgment) (noting that agency adjudication is a function that "forms part of the agencies' execution of public law").

[15] Morrison v. Olson, 487 U.S. 654, 691 (1988) (characterizing independent counsel's prosecutorial function as executive).

operates in the opposite direction, providing grounds to resist congressionally imposed requirements for separation.[16]

More functionalist approaches to separation of powers have little more to say about the separation of functions within the agency because their guiding concern is still the overall balance of authority among the branches, and preservation of the core functions of each branch.[17] They may be more tolerant of congressional efforts to divide and separate executive powers, at least in service of achieving balance and checks on power.[18] But unless the combination of functions within the agency itself threatens the balance of power among the branches, and it would not necessarily do so, combination of functions does not trigger separation of powers concern on these approaches either.

What should we make of this distance between separation-of-powers doctrine and the separation of functions within administrative agencies? At a descriptive level, it could be seen as an illustration of the larger point that separation of powers, with its emphasis on the three branches and three types of power as the units of analysis, fails to provide a helpful framework for understanding the constraints and division of authority in contemporary government, especially administrative government. Some scholars have reached that diagnosis.[19] It might illustrate the absence of a constitutional principle of separation of powers that stands independently from the way in which the Constitution separates and blends powers in its more specific clauses.[20] Or it might reflect a choice to permit the creation of institutions that can exercise all types of government functions so long

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[16] *See, e.g.*, *id.* at 709 (Scalia, J., dissenting) (arguing that it is not for the Court to determine "how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.").

[17] *See* Lawson, *supra* note 7, at 860 (providing an account of these approaches to separation of powers); Magill, *supra* note 7, at 611 (same).

[18] *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

[19] *See, e.g.*, EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 45-48 (2005) (arguing that separation of powers does not provide a useful tool for understanding modern government and developing an alternative understanding of the modern state); Magill, *supra* note 7, at 649-60 (arguing for abandoning separation of powers as the framework for understanding division of authority in government, in part because it asks the wrong questions, and calling for attention to the varieties of institutional arrangements in government).

[20] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 113 HARV. L. REV. (forthcoming 2011) (arguing for the absence of a freestanding separation-of-powers doctrine that standard apart from the Constitution's specific structural provisions); *see also* Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. (forthcoming 2011) (arguing that in the absence of a specific procedural requirement, structural provision, or assignment of function to particular officials in the Constitution, courts apply a forgiving standard with regard to separation-of-powers claims including as to the Constitution's Vesting Clauses).

as they do so over a limited terrain.[21] Regardless of the best explanation for the silence of separation-of-powers law on the combination of agency functions,[22] if we assume with Madison that some combination of functions could threaten basic ideas of fairness and the rule of law, it seems important that some enforceable separation apply. These fairness concerns have not gone unnoticed or unaddressed in the law. The logical constitutional home for requiring separation for adjudicators is due process, but the Supreme Court has not mandated separation of functions under the Due Process Clauses. Rather, these concerns are primarily addressed by the Administrative Procedure Act (and other agency-specific statutes).

B. *Due Process*

The Supreme Court has not been impressed with arguments that the combination of investigative and enforcement functions with adjudicative ones violates due process. Due process, of course, calls for procedural fairness and the appearance of fairness,[23] as well as a neutral decisionmaker.[24] But the "combination of investigative and adjudicative functions does not, without more, constitute a due process violation."[25]

The Court has consistently rejected challenges to combination of functions in federal administrative agencies as violating due process. The Supreme Court's decision in *FTC v. Cement Institute*[26] is illustrative. The industry group challenged a FTC adjudicative decision on the ground that, in reports and testimony prior to initiating the enforcement proceeding, members of the FTC had taken the view that

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21 *See* Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22 (1992) (noting that in American separation of powers, regulatory agencies are "'omnipowered'—able to legislative, execute, and adjudicate—but 'unicompetent'—entitled to exercise their many powers over only a small terrain" in contrast to three branches which are "omnicompetent" but "unipowered").

22 Indeed, the silence may well be related to the fact that other sources of law address these issues. *See* Metzger, *supra* note 10, at 453-57 (suggesting that the existence of administrative requirements for separation of functions provides a partial explanation for the Court's reluctance to enforce separation internal to the executive branch through constitutional law).

23 *See, e.g.*, Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 619 (1993) ("[J]ustice . . . must satisfy the appearance of justice." (quoting Marshall v. Jerricho, Inc., 446 U.S. 238, 243 (1980))).

24 *See generally* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (due process requires that a citizen-detainee have an opportunity to challenge his status before a neutral decisionmaker); *Concrete Pipe & Prods. of Cal.*, 508 U.S. at 617 ("[D]ue process requires a 'neutral and detached judge in the first instance.'" (citation omitted)).

25 Withrow v. Larkin, 421 U.S. 35, 58 (1975).

26 333 U.S. 683 (1948).

the industry practice at issue violated the Sherman Act.[27] The Court concluded that these "prior ex parte investigations did not necessarily mean the minds of the members were irrevocably closed," and did not rise to the level of violating due process.[28] While some combination of functions in a particular case could support a showing of breach of due process,[29] thus far due process has done little to require separation of functions within the agency.

C. *The Administrative Procedure Act*

In response to concerns about threats to impartiality from combination of functions,[30] the Administrative Procedure Act (APA) provides the most significant response to the dangers posed by combination of agency functions, and enforceable requirements for separation of functions. In several ways, the APA isolates agency adjudicators from agency staff involved in the investigation or prosecution.

The APA requires that employees involved in adversarial investigation or prosecution may not "participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings."[31] This prohibition separates the agency's adversaries from the agency's decisionmakers both as a matter of personnel, and as a matter of communication. This separation requirement does not, however, apply to agency heads, whether a single administrator or to a collegial body.[32] Moreover, if an initial adjudicative decision is appealed to the agency head, the agency head has all the power it would have if it had made the initial decision.[33] These exemptions permit agency heads to "supervise both lower level decisionmakers and prosecutors and personally to investigate, prosecute, advocate, advise adjudicators, and render final judgments."[34]

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27 *Id.* at 700.

28 *Id.* at 701-02.

29 *See Withrow*, 421 U.S. at 58 (noting that a court could concluding from the "special facts and circumstances present in the case before it that the risk of unfairness is intolerably high").

30 *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 472 (2003) (arguing the APA sought to remedy concerns about impartiality produced by combination of functions).

31 5 U.S.C. § 554(d) (2006). The APA also provides that the hearing officer "may not consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." *Id.* § 554(d)(1).

32 *See id.* § 554(d)(2)(C) (the subsection "does not apply . . . to the agency or a member or members of the body comprising the agency").

33 *Id.* § 557(b).

34 Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 766 (1981) (emphasis omitted).

The APA also establishes a "command influence rule," which prohibits administrative adjudicators from being "responsible to or subject to the supervision or direction of an employee . . . engaged in . . . investigative or prosecuting functions for an agency."[35] Adjudicators thus may not report to individuals engaged in enforcement for the agency. Most initial adjudicators in formal agency adjudications are administrative law judges (ALJs) who enjoy good-cause protection.[36] Power to remove ALJs is vested in a body outside the agencies in which the ALJs work, the Merit Systems Protection Board,[37] whose tenure is also protected by a good-cause provision.[38] On occasion, Congress has departed from these APA defaults. Among many variations, for example, it has strengthened separation of functions for some agencies through so-called split-enforcement (or split-function) models under which it creates an adjudicative agency separate from another body charged with enforcement and rulemaking.[39]

For many, the APA may provide a sufficient response to concerns raised by combination of functions, and obviate the need for separation of powers to attend to separation of functions within the agency. Whether for this reason or some other, separation of functions has fallen outside of separation-of-powers doctrine.

II. *PCAOB*'S PRINCIPLE

The Supreme Court's decision in *PCAOB* draws separation of functions within the agency into separation-of-powers analysis. It does so by making the validity of good-cause removal protections under separation of powers depend on the combination of functions within the agency. To see how the Court embedded separation of functions into its separation-of-powers analysis requires viewing the Court's decision in the context of the well-settled constitutionality of good-cause protections for agencies with adjudicative powers.

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35 5 U.S.C. § 554(d).

36 *Id.* § 7521.

37 *Id.*

38 *Id.* § 1202.

39 Congress has created split-enforcement models with separate bodies conducting adjudication and enforcement. *See, e.g.*, Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 268-70 (describing "split-enforcement model" of OSHA and MSHA which provide for agencies, with good cause protection, to handle the adjudication separate from agencies tasked with standard setting and enforcement); *see also* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987) (providing an account of these split-enforcement models).

A. *The* PCAOB *Decision in Brief*

Congress created the Public Accounting Oversight Board as part of the Sarbanes-Oxley Act of 2002[40] to oversee the auditing of public companies. The Act granted the Board a broad range of statutory powers, including to issue regulations governing accounting and auditing practices and to initiate enforcement proceedings regarding violation of its own regulations and other securities laws.[41] In addition, as discussed in greater detail below, the Board also has authority to institute and adjudicate disciplinary proceedings, imposing fines and other sanctions.[42]

The Sarbanes-Oxley Act vested the power to appoint and to remove the members of the Board in the Securities Exchange Commission.[43] The SEC appoints the Board members for staggered five-year terms, and can remove them only "for good cause shown," after opportunity for a hearing.[44] The Free Enterprise Fund challenged this method of appointment under the Appointments Clause,[45] and argued that the good-cause removal protection for the Board violated separation of powers.

The Supreme Court, with Chief Justice Roberts delivering the opinion of the Court for five Justices, rejected the challenges to the Board's appointment, holding that the Board members were inferior officers and that the SEC was the "Hea[d]" of a "Departmen[t]."[46] But the Court struck down the Board's good-cause removal protection.[47] The crux of the *PCAOB* majority's reasoning was that two layers of good-cause protection (of the SEC from President, and of the Board from the SEC) impermissibly withdrew from the President the power to determine whether good cause to fire members of the Board existed.

The Court noted that it had repeatedly upheld good-cause protections for both principal and inferior officers where "only one level of protected tenure separated the President from an officer exercising

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40 Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 5, 11, 12, 15, 18, 28, 29 and 49 U.S.C.).

41 15 U.S.C. §§ 7213-7215.

42 *Id.* § 7215(c).

43 *See PCAOB*, 130 S. Ct. 3138, 3148-49 (2010) (indicating party agreement that the Commissioners of the SEC may not be removed except for good cause, and deciding the case on that basis).

44 15 U.S.C. § 7211(e)(6).

45 The Free Enterprise Fund argued that the members of the Board were principal officers, requiring nomination by the President, and in the alternative that only the Chairman of the Commission, and not the SEC, is a "Head of Department." The Court rejected both of these challenges under the Appointments Clause. *See PCAOB*, 130 S. Ct. at 3162-64.

46 *Id.* at 3162-63.

47 *Id.* at 3154-55.

executive power,"[48] and decided the case on the understanding that the Commissioners of the SEC cannot be removed by the President except for good cause, despite the absence of a statutory good-cause standard for the SEC.[49] But the removal protection applicable to the Board, the Court wrote, "does something quite different."[50] The second layer of protection, the Court reasoned, "makes a difference" because it "changes the nature of the President's review."[51] With it, neither the President nor those directly accountable to him, nor even an officer whose conduct the President may review for good cause, has "full control" over the Board.[52] This second layer of protection prevents the President from holding the "[SEC] fully accountable for the Board's conduct, to the same extent that he may hold the [SEC] accountable for everything else that it does" because the SEC is "not responsible for the Board's actions," but only "for their own determination of whether the Act's rigorous good-cause standard is met."[53]

For the *PCAOB* majority, this meant that the President could not ensure that the "laws are faithfully executed," because the Act strips the President of "his ability to execute the laws—by holding his subordinates accountable for their conduct."[54] Based on this largely functionalist analysis of the way in which the dual layer of removal protection impedes the President's ability to perform his constitutional duties,[55] the Court "h[eld] that the dual for-cause limitations"[56] on the removal of the Board were "incompatible with the Constitution's separation of powers."[57] As to the remedy, the Court severed the tenure protections of the Board from the rest of the Sarbanes-Oxley Act.[58]

Justice Breyer dissented. He argued at length that the Court failed to show why the second layer of removal makes a difference to the President's control over the Board,[59] and that the Court's holding puts the good-cause protection for thousands of employees within independent agencies at risk, including members of the Senior Executive Service and ALJs.[60] Justice Breyer devoted considerable

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48 *Id.* at 3153.

49 *Id.* at 3148-49.

50 *Id.*

51 *Id.* at 3153-54.

52 *Id.* at 3154.

53 *Id.*

54 *Id.*

55 *Cf.* Morrison v. Olson, 487 U.S. 654, 693 (1988) (assessing the constitutionality of the independent counsel's removal protections based on whether they "interfere[d] impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws" as opposed to the functions of the independent counsel).

56 *PCAOB*, 130 S. Ct. at 3151.

57 *Id.* at 3155.

58 *Id.* at 3161-62.

59 *See id.* at 3171-72 (Breyer, J., dissenting).

60 *Id.* at 3180-82.

attention to the decision's effect on ALJs. Like the Board, ALJs are "all [inferior] executive officers," Justice Breyer noted, quoting Justice Scalia.[61] Moreover, he pointed out, ALJs are removable only for good cause, and removable only by an agency, the Merit Systems Protection Board, whose members themselves are removable only for good cause.[62] Thus, if two layers of good-cause protection were sufficient to invalidate the second layer of protection, Justice Breyer worried that the *PCAOB* majority opinion had cast aside the removal protections of ALJs in independent agencies as well.[63]

B. *Removal Protection for Adjudicators*

If the *PCAOB* majority opinion discarded the protection for adjudicators, like ALJs, as Justice Breyer warned, the decision would dramatically change the law in this area. Despite the Supreme Court's shifting constitutional tests for agency independence, it has consistently upheld the constitutionality of Congress's choice to provide officers with adjudicative functions with good-cause protection from removal.

Adjudication was a primary and uncontroversial function of the earliest independent agencies.[64] It was the primary function of the Interstate Commerce Commission, and a significant portion of the business of the FTC.[65] As Professor Paul Verkuil suggests, many of the organizational features of independent agencies suit them for adjudication. Independent agencies are predominantly collegial bodies;[66] collegial decisionmaking "is meant to be consensual, reflective and pluralistic."[67] Their collegial structure requires decisionmaking through shared opinions and group deliberation.[68] In these respects, independent agencies generally emulate appellate courts.[69]

The logic for permitting good-cause removal protection for those who engage in adjudication is clear enough. The idea that adjudicative functions justify protection from removal for political reasons, or for no reasons at all, appeals to very fundamental ideas about fair process.

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61 *Id.* at 3180 (quoting Freytag v. Comm'r, 501 U.S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in the judgment)).

62 *Id.* at 3180 (citing 5 U.S.C. §§ 7521(a)-(b), 1202(d) (providing good cause protection for ALJs and the Merit Systems Protection Board, respectively)).

63 *Id.* at 3181.

64 Verkuil, *supra* note 39, at 263.

65 *Id.*

66 *Id.* at 260.

67 *Id.*

68 *Id.* at 260-61.

69 *Id.* at 261.

Adjudication, as noted above, calls for procedural fairness, and a neutral decisionmaker.[70] The appearance of neutrality is threatened when an adjudicator faces the prospect of at-will removal based on the merits of his or her decisions. While there is clearly no constitutional requirement of removal protection for those who engage in adjudication, the Supreme Court's decisions construing the President's removal powers reflect a special tolerance for Congress's choice to insulate those with adjudicative functions with good-cause removal protections.[71]

This tolerance is clearly evident in *Humphrey's Executor v. United States*.[72] In the Court's decision upholding the Federal Trade Commission's good-cause removal protections, the Court relied extensively on the FTC's quasi-judicial functions. Because the FTC adjudicated, the Court saw invalidating its removal protections as directly calling into question similar protections not only for "the members of these quasi-legislative and quasi-judicial bodies, but [also for] judges of the legislative Court of Claims, exercising judicial power."[73] The prospect of sweeping aside removal protections for Court of Claims judges (and presumably, others engaged in adjudication) was particularly unwelcome. The Court firmly rejected a principle that would lead to that conclusion: "We think it plain," the Court wrote, that the Constitution does not grant the President that "illimitable power of removal . . . of officers of the character of those just named."[74] For the Court, Congress's power to restrain the President's removal authority over these officers hinged on the need for independence of adjudicators: "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."[75]

Calling attention to the centrality of adjudicative functions as a ground for the Court's decision in *Humphrey's Executor* does not, however, entail broad endorsement of the decision. To be sure, the decision's reasoning has been discredited in several respects. It curiously located the FTC outside the executive department,[76] and left unexplained and virtually unacknowledged the FTC's substantial enforcement powers, surely executive in kind.[77] Moreover, even its

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70 *See supra* notes 23-24.

71 Wiener v. United States, 357 U.S. 349, 355-56 (1958); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

72 *Humphrey's Ex'r*, 295 U.S. at 629.

73 *Id.*

74 *Id.*

75 *Id.* The need for that independence, the Court went on, "cannot well be doubted." *Id.*

76 *Id.* at 628.

77 *See* Morrison v. Olson, 487 U.S. 654, 689 n.28 (1988) (noting that the powers of the FTC would at the present time be considered executive).

justification for officials maintaining an attitude of independence appears to have been overly inclusive, at least in the sense that it offered this justification not only for "quasi-judicial" bodies, but also for "quasi-legislative" ones. The due process and fairness considerations that justify tolerating Congress's choice of insulation with regard to quasi-judicial functions do not apply to quasi-legislative powers, at least in the sense of rulemaking. Indeed, quasi-legislative functions in the sense of agency rulemaking are particularly strong candidates for the President's oversight.[78] In this regard, it is worth noting that, as Professor Peter Strauss has pointed out, the Court in *Humphrey's Executor* invoked "quasi-legislative" in a far more limited sense than its typical use today: "'Quasi-legislative' as that Court used the phrase, referred not to policy formation but to the exercise of investigatory authority in support of reports to the Congress."[79] Unlike legislative rules, reports to Congress are not policymaking in the sense of creating norms that bind the public. Nonetheless, FTC's protections have remained as it has accumulated quasi-legislative powers in the familiar contemporary sense of rulemaking powers. That fact, combined with *Humphrey's Executor*'s invocation of expertise and policy formation as grounds for independence,[80] certainly invites broader readings of the decision. But one need not deny that *Humphrey's Executor* justified removal protections on grounds other than the adjudicative functions of the FTC, and goes astray in other respects, to see that that adjudication provided a central and arguably independent basis for upholding FTC's protections.[81]

The principle that adjudicative functions justify upholding good-cause removal protection for agencies finds further, and perhaps even stronger, support in *Wiener v. United States*.[82] In *Wiener*, the Court held that the President lacked authority to remove, without cause, a member of the War Claims Commission whose function was to adjudicate. The Court reached this decision even though the statute

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78 For a classic statement, see *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981), noting the "basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy." *See also* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1131-46 (2010) (providing a concise account of grounds for presidential supervision of rulemaking).

79 Strauss, *supra* note 18, at 615.

80 *See, e.g.*, *Humphrey's Ex'r*, 295 U.S. at 624 ("[I]ts members are called upon to exercise the trained judgment of a body of experts . . . .").

81 *See* HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 425 (2006) (noting that the FTC's adjudicative functions provide justification as a ground for upholding their removal protection in *Humphrey's Executor* "because of what they do but not because those activities are something other than execution of the law"); Strauss, *supra* note 18, at 622-23 (noting that adjudicative functions provide a politically neutral basis for upholding congressional judgments regarding the government structures, such as removal provisions, that limit presidential control).

82 357 U.S. 349 (1958).

creating the War Claims Commission was silent as to removal.[83] *Wiener* emphasized that the Commission's charge was "adjudicat[ion] according to law," which involved resolutions "on the merits of each claim, supported by evidence and governing legal considerations, by a body that was 'entirely free from the control or coercive influence, direct or indirect.'"[84] The Commission must be protected by a good-cause removal protection, the Court reasoned, not only from the President's influence "in passing on a particular claim," but "*a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."[85] The power of at-will removal on the basis of a quasi-judicial officer's exercise of those powers is the Damocles' sword that *Wiener* and *Humphrey's Executor* viewed as permissible for Congress to take away from the President.[86]

To highlight the grounds for protecting adjudicators from at-will removal, the Court in *Wiener* emphasized that *Humphrey's Executor* had "explicitly 'disapproved' the expressions in *Myers* [*v. United States*] supporting the President's inherent constitutional power to remove members of quasi-judicial bodies."[87] Recall that *Myers v. United States* struck down a provision that required the Senate's consent for the President to remove an officer.[88] Along the way, the *Myers* Court famously suggested that while the President may rightly be restricted from influencing the discharge of duties of a quasi-judicial character in a "particular" case, the President "may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."[89] The *Myers* opinion went on to comment that such review of adjudicators' performance was required for the President to fulfill his duty to take care the laws "be faithfully executed."[90] As emphasized by the Court in

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83 *Id.* at 350.

84 *Id.* at 355-56.

85 *Id.* at 356.

86 The absence of statutory removal protections for the Commissioners in *Wiener* strengthens the support the decision lends to the proposition that the power to remove an adjudicator at will threatens the adjudicator's neutrality. The implication could be grounded in a presumption of congressional intent. Professor Verkuil has suggested that the grounds for the implication could be viewed as constitutional. *See* Paul R. Verkuil, *The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 332 (1989) ("Because the basis for the Court's decision [in *Wiener*] could not be statutory, it must have been constitutional.").

87 *Wiener*, 357 U.S. at 352 (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 626-27 (1935)).

88 Myers v. United States, 272 U.S. 52, 174 (1926).

89 *Id.* at 135.

90 *Id.*

Wiener, *Humphrey's Executor* rejected this suggestion in *Myers* that Congress could not insulate quasi-judicial officers from removal (and implicitly that the President's duties under the Take Care Clause required the opposite).

The strong and consistent validation (and even implication of) removal protection for officers engaged in adjudication has not been undermined in later decisions. Indeed, removal protections for adjudicative officers were simply not presented. The good-cause removal protections at issue in *Morrison v. Olson* pertained to an officer engaged in purely executive functions, not adjudicative ones.[91] And while the *Morrison* Court distanced the removal inquiry from the focus in *Humphrey's Executor* and *Wiener* on the character of the officials' functions,[92] the *Morrison* Court still conceded that that "[i]t is not difficult to imagine situations in which Congress might desire that an official performing 'quasi-judicial' functions, for example, would be free of executive or political control."[93] Likewise, the removal protections at issue in *Bowsher v. Synar* did not pertain to adjudicative functions.[94] In short, the Supreme Court's removal decisions provide consistent support for the constitutionality of Congress's choice to insulate agencies that adjudicate with good-cause removal protection.

It is not the case, of course, that this consistent defense of good-cause protection for those who adjudicate is without cost to the President's constitutionally protected oversight powers. It is a familiar thought that courts make policy when they interpret statutes, and agency adjudicators do so as well.[95] That adjudication involves consideration of policy factors is all the more plain when the agency, as opposed to a court, is the adjudicator. Where a statute does not specify a particular mode of proceeding, agencies have long enjoyed considerable discretion as to the choice to implement their statutory powers through adjudication, rulemaking, or in other ways.[96] That choice suggests the extent to which agency adjudication may involve policymaking. Good-

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[91] Morrison v. Olson, 487 U.S. 654, 691 (1988) (noting that independent counsel's functions are executive in nature).

[92] *Id.* at 688-89.

[93] *Id.* at 691 n.30.

[94] Bowshar v. Synar, 478 U.S. 714, 733 (1986) (concluding Comptroller General's functions are executive).

[95] *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 431-34 (2008) (defending the claim that some policymaking inheres in statutory interpretation by courts); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 634 (1996) (noting that if construction of ambiguous statutes is interpretive lawmaking, then agencies and courts will occasionally need to rely on policy considerations in statutory construction).

[96] *See* SEC v. Chenery (*Chenery II*), 332 U.S. 194, 209 (1947); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386-1403 (2004) (providing account of agency choice of form and the distinct features of these forms).

cause removal protections for those who adjudicate clearly inhibit the President's supervision of the implementation of policy. Those costs are real.

But, in the Supreme Court's prior validation of good-cause protections for agencies engaged in adjudication, the concern for protection of the independence of adjudicators outweighed the countervailing interest in the President's control over these officials and their decisions. That is the important point for our purposes: in the Supreme Court's prior decisions, the tension between insulation of adjudicators and the President's control over law-implementation was not only acknowledged, but also resolved in favor of preserving protection for adjudicators when Congress had granted it.

C. *Adjudicators in* PCAOB

The *PCAOB* majority did not seek to eliminate this constitutional safe harbor for removal protection for officials who adjudicate. Rather, it tried to *distinguish* the Board, whose removal protections it invalidated, from officials who engage in adjudication under dual-layer removal protections. The distinctions the Court most explicitly invokes are not persuasive, but once cleared away, they help to expose the key ground of the Court's decision.

In response to Justice Breyer's claim that the majority eliminates or seriously undermines protections for adjudicators,[97] the majority disagreed, stating that its holding "does not address that subset of independent agency employees who serve as administrative law judges."[98] Administrative law judges, as noted above, operate under a dual layer of good-cause removal protection just as the Board did.[99] The passage (a footnote) in which the Court offers distinctions between the Board and ALJs is relatively short, and worth setting out in full:

> [O]ur holding also does not address the subset of independent agency employees who serve as administrative law judges. *See, e.g.*, 5 U.S.C. §§ 556(c), 3105. Whether administrative law judges are necessarily "Officers of the United States" is disputed. *See, e.g.*,

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97 *PCAOB*, 130 S. Ct. 3138, 3180 (2010) (Breyer, J., dissenting).

98 *Id.* at 3160 n.10 (majority opinion).

99 Professor Peter Strauss suggests in his contribution to this Festschrift that the fact that ALJs are part of the agencies in which they serve, not themselves separate agencies, distinguishes them from the Board, and also provides a response to Justice Breyer's argument that the *PCAOB* majority calls into question a wide variety of institutional arrangements in which individuals, like ALJs and members of the Senior Executive Service, operate under two levels of good cause removal protection. The removal protection of individuals, Strauss argues, are a different matter than the removal protections of institutions. *See* Peter L. Strauss, *On the Difficulties of Generalization*—PCAOB *in the Footsteps of* Myers, Humphrey's Executor, Morrison *and* Freytag, 32 CARDOZO L. REV.2253, 2273 (2011).

> Landry v. FDIC, 204 F.3d 1125 (C.A.D.C. 2000). And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, see §§ 554(d), 3105, or possess purely recommendatory powers. The Government below refused to identify either "civil service tenure-protected employees in independent agencies" or administrative law judges as "precedent for the PCAOB." 537 F.3d 667, 699 n.8 (C.A.D.C. 2008) (Kavanaugh, J., dissenting); *see* Tr. of Oral Arg. in No. 07-5127 (C.A.D.C.), pp. 32, 37-38, 42.[100]

Substantively, the Court suggests several distinctions: In contrast to the Board, ALJs (1) are not "necessarily" inferior officers, as opposed to employees, (2) adjudicate, and/or (3) possess purely recommendatory powers. These considerations do not distinguish the Board from ALJs. Two of these considerations can be set aside swiftly. Many ALJs are inferior officers, and closely related, many ALJs possess final, not purely recommendatory powers, as I discuss in the margin.[101]

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100 *PCAOB*, 130 S. Ct. at 3160 n.10.

101 An appointee is an "officer," not an employee, for the purposes of the Appointments Clause if he or she "exercise[es] significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126 (1976); *see* Edmond v. United States, 520 U.S. 651, 662 (1997) (the exercise of "significant authority pursuant to the laws of the United States," as stated in *Buckley*, marks the line between officer and nonofficer). Applying this standard in the context of administrative adjudicators, all members of the Court in *Freytag v. Commission*, 501 U.S. 868 (1991), agreed that "special trial judges" of the U.S. Tax Court are "inferior officers." *See id.* at 880-82; *id.* at 901 (Scalia, J., concurring in part and concurring in the judgment) (agreeing that special trial judges are inferior officers). While the *Freytag* reasoning has been undermined in some respects, it still provides the leading application of the officer/employee distinction as to executive branch adjudicators. In *Freytag*, the Court relied on a several factors to support this conclusion that the special trial judges exercised significant authority, and thus constituted officers, including: (1) the special trial judge's office is "established by law;" (2) they exercise discretion and perform more than ministerial tasks; (3) they take testimony; (4) they rule on the admissibility of evidence and enforce discovery orders; and (5) while they do not have a general power to enter a "final decision," the Chief Judge of the Tax Court may assign them to render decisions in declaratory judgment proceedings and limited-amount cases. *See id.* at 881-82.

The *PCAOB* majority cites *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), to support the statement that ALJs are not "necessarily" inferior officers. In *Landry*, the D.C. Circuit held that administrative law judges operating under the Federal Institutions Reform, Recovery, and Enforcement Act (FIRREA), 12 U.S.C. § 1818 (2006), were employees, not inferior officers. *See Landry*, 204 F.3d at 1134. The court in *Landry* read *Freytag* narrowly as stating a simple test for determining whether a judicial official is an officer under the Appointments Clause: Whether the judicial official has the power to render final decisions (and thus exercise significant authority under the Appointments Clause). *See id.* at 1133-34. Because the administrative law judges operating under FIRREA only had power to issue recommended decisions, the court in *Landry* concluded that they were mere employees. *Id.* at 1134. Judge Randolph concurred in part, arguing there was simply no distinction between the judges at issue in *Landry* and in *Freytag*, and that the power to render final decisions is not necessary under *Freytag* for officer status. *See id.* at 1141 (Randolph, J., concurring in part and concurring in the judgment).

Regardless of whether *Landry* constitutes the best reading of *Freytag*'s test for the officer/nonofficer distinction, *see* John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 909-10 (2009) (intimating that it is not), other statutes grant administrative law judges powers that would make them inferior officers, even under *Landry*'s restrictive reading of *Freytag*. Consider, for instance, the more than 1300

The more curious and important distinction is the Court's comment that, "unlike members of the Board," ALJs perform "adjudicative rather than enforcement or policymaking functions."[102] On the one hand, this statement could be read as suggesting that the Board does not have adjudicative functions. That is how Justice Breyer read it.[103] But that reading is hard to square with the Court's general description of the Board's powers. In its opening description of the Board, the Court notes that the Board not only promulgates standards but also performs inspections, demands documents and testimony, and initiates "formal investigations and disciplinary proceedings."[104] Further, the Court specifically observes that the Board can issue monetary sanctions in disciplinary proceedings.[105] Thus, the Court explicitly notes functions which it would clearly recognize as adjudicative.

In any event, the Sarbanes-Oxley Act makes plain that the Board does have adjudicative functions. The Act not only grants the Board the power to establish procedures for disciplining public accounting firms, the provision generally noted by Justice Breyer,[106] and broad investigative powers, but also grants the Board adjudicative powers. The Board's adjudicative powers relate closely to its investigative functions. The Board may conduct investigations of violations of the law or its own rules[107] and can require the testimony or production of

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administrative law judges used by the Social Security Administration, also an independent agency. *PCAOB*, 130 S. Ct. at 3213-14 app. C (Breyer, J., dissenting); *see* Pub. L. No. 103-296, § 101, 108 Stat. 1464 (1994). They are charged with conducting de novo hearings, including the power to manage the factual information presented, and judge the credibility of witnesses. 20 C.F.R. § 404.944 (2011). As to the form of decision, the SSA administrative law judge's decision must include findings of fact as well as a statement of reasons for the decision. *Id.* §§ 404.952(a), 416.1453(a). Unless the administrative law judge chooses to designate his or her decision as a recommended decision, a decision is binding and final unless it is revised by the administrative law judge or reversed by the Appeals Council. *Id.* §§ 404.955, 416.1455.

Given the finality of administrative law judge decisions under the Social Security Administration, even the analysis of *Landry* would support the conclusion that those administrative law judges are inferior officers. *Freytag* also directly supports that conclusion. *See Landry*, 204 F.3d at 1143 (Randolph, J., concurring in part and concurring in the judgment) (arguing that ALJs at issue are inferior officers under *Freytag*); *see also Freytag*, 501 U.S. at 910 (Scalia, J., concurring in part and concurring in the judgment) ("[A]dministrative law judges numbering more than 1,000 . . . are all *executive* officers."); Duffy, *supra*, at 905-10. Like the special trial judges in *Freytag*, ALJ's positions are "established by law." *PCAOB*, 130 S. Ct. at 3213-14 app. C. (Breyer, J., dissenting). They conduct evidentiary hearings, including ruling on issues of evidence, enforce discovery orders, and they have "significant discretion." *Freytag*, 501 U.S. at 882. In short, some ALJs operating within administrative agencies are inferior officers and possess more than purely recommendatory functions. Accordingly, the PCAOB Board cannot be distinguished from ALJs on the grounds that (all) ALJs are not "inferior officers."

102 *PCAOB*, 130 S. Ct. at 3160 n.10.

103 *Id.* at 3174 (Breyer, J., dissenting) (commenting that the majority "asserts that the Board does not 'perform adjudicative . . . functions'" (alteration in original)).

104 *Id.* at 3148 (majority opinion) (citing 15 U.S.C. §§ 7213-7215 (2006)).

105 *Id.* (citing 15 U.S.C. § 7215(c)(4)).

106 *See id.*

107 15 U.S.C. § 7215(b)(1).

documents in connection with its investigations.[108] When it brings charges, they must be "specific," and provide the defendants an "opportunity to defend against."[109] But also, as the majority observed, the Act provides that if the Board finds violations of the law, it may impose "such disciplinary sanctions and remedies" as it deems appropriate up to $750,000 for natural persons, and up to $15 million for other persons.[110] Such disciplining and sanctioning involve adjudication.

Moreover, even a cursory look at the Board's activities reveals that adjudication is not merely a statutory possibility: the Board has been actively engaged in adjudication since 2005.[111] Contested disciplinary proceedings are confidential and nonpublic until there is a final adjudication by the Board.[112] The Board has reached several final disciplinary adjudications, and published its opinions and orders in those cases.[113] It is not the case, then, that the Board can be distinguished from ALJs on the ground that the Board does not adjudicate. Adjudication may not be the Board's primary task, as it was for the early FTC, but it is one of them.

To summarize, if we read the *PCAOB* majority opinion as committed to the constitutionality of removal protections for ALJs, including those operating in independent agencies, then it cannot be the two levels of removal protection alone that decided the case. And once we acknowledge that the Board adjudicates, the problem becomes harder. The question is what, in addition to the dual removal provisions, explains the invalidity of the Board's removal protection yet maintains the constitutionality of protections for ALJs. The distinctions the Court most clearly invoked do not hold up, but another decisive difference remains.

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108 *Id.* § 7215(b)(2).

109 *Id.* § 7215(c)(1).

110 *Id.* § 7215(c)(15).

111 For the Board's settled disciplinary orders, see *Settled Disciplinary Orders*, PCAOB, http://pcaobus.org/Enforcement/Decisions/Pages/default.aspx (last visited Apr. 3, 2011).

112 *See* 15 U.S.C. § 7215(d)(1)(C), (e)(1) (providing that the Board will making disciplinary sanctions public once the stay has been lifted pending SEC review of any Board sanctions); *see also* BYLAWS & RULES OF THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, RULE 5203 (2010), *available at* http://pcaobus.org/Rules/PCAOBRules/Documents/All.pdf (providing that disciplinary hearings shall be private unless ordered to be public by the Board for good cause shown and with the consent of the parties).

113 *See Adjudicated Disciplinary Orders and Opinions*, PCAOB, http://pcaobus.org/Enforcement/Adjudicated/Pages/default.aspx (last visited June 19, 2011).

D. *Combination of Functions of the Board*

One clear and immediate difference is that ALJs to which the Court refers have only adjudicative functions, whereas the Board has enforcement and policymaking functions in addition to its adjudicative role. This leads to an intriguing question: Does the *combination of functions* (of the Board) make a difference to the constitutionality of its removal protections?

The traditional view is that a combination of functions does not undermine the grounds for good-cause removal protection for adjudicators.[114] One conventional reason for upholding removal protection with regard to officers' non-adjudicative functions is to enforce the protection for their adjudicative role. The concern is that it is all too easy for the President (or Head of Department) to state that he or she is removing an official based on the official's performance of executive or policymaking roles, as Professor Verkuil explains, "but really intending to punish him or her for unsatisfactory adjudicative . . . decisions."[115] This position is based in part on the pragmatic idea that discerning true motive is often difficult,[116] and difficult enough to justify the prophylactic protection of insulating the adjudicator from at-will removal based on his or her performance of other functions. In other words, the conventional understanding, deriving from a contemporary gloss on the quasi-legislative functions of the FTC *Humphrey's Executor*, is that an agent's combination of functions—policymaking or enforcement in addition to adjudication—has not made a difference to the constitutionality of removal protections.

PCAOB changes that understanding. To hold onto the *PCAOB* majority's view that the decision does not cast aside removal protection for adjudicators within independent agencies, we need some ground to distinguish the Board from those adjudicators. The most salient distinction is that the Board has a combination of functions, whereas ALJs performing purely adjudicative roles do not; it is the Board's combination of policymaking, enforcement and adjudicative functions

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114 Verkuil, *supra* note 86, at 332-33 ("It should be constitutionally valid for Congress to restrict presidential removal to cause for certain functions that independent commissioners perform, namely judicial-like ones, and also apply those restrictions to other functions that are not otherwise constitutionally protectable, such as prosecution or rulemaking functions.").

115 *Id.* at 333. Justice Breyer joins ranks with Professor Verkuil on this point in his dissenting opinion in *PCAOB*. *See PCAOB*, 130 S. Ct. 3138, 3174 (2010) (Breyer, J., dissenting) ("Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal.").

116 Verkuil, *supra* note 86, at 333.

that provides the "something more" than the two levels of good-cause protection to decide the case.

Turning back to the passage from the majority's opinion quoted in block-indent above, this is a possible reading of the difference between the Board and ALJs to which the majority was gesturing. We left that discussion with the unsettling prospect that the Court recognized but later appeared to deny that the Board engaged in adjudication. A better reading now comes into view. The ALJs' adjudicative functions do not themselves mark the line between ALJs and the Board. Rather, the fact that the Board *also* performs enforcement and policymaking functions distinguishes it from ALJs.[117]

If it is the Board's combination of functions that makes a difference, then the *PCAOB* majority has done something quite interesting and important: It has altered the long-held view that separation of functions is not relevant to determining the constitutionality of removal protections. On this view, *PCAOB* embraces the principle that the constitutionality of good-cause removal provisions depends on the separation of functions—in particular, whether the officer is a dedicated adjudicator or also exercises policymaking and enforcement functions. Separation of powers is violated by good-cause protection for an agency with a combination of functions, but not for an agency that only adjudicates. With that principle, separation of powers finds a new dependence on the separation of functions within the agency.[118]

In this way, the *PCAOB* Court ends up embracing as a matter of constitutional law a principle that Professor Verkuil argued should bear on statutory design. In 1988, Professor Verkuil argued there was a mismatch between the functions of independent agencies and their independence. He suggested that Congress should consider shearing executive and policymaking functions from independent agencies, leaving the independent agencies with solely adjudicative work, as it had in "split-enforcement" agencies.[119] The functions of policymaking,

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[117] This requires implying "in addition" into the Court's statement that "unlike members of the Board, many administrative law judges of course perform adjudicative rather than [in addition] enforcement or policymaking functions." *PCAOB*, 130 S. Ct. at 3160 n.10.

[118] The distinction also reveals the persistent place of assessment of the agency's functions within the constitutional evaluation of removal protection, and thus the continuing import of at least this one aspect of the analysis of *Humphrey's Executor*.

[119] Verkuil, *supra* note 39, at 268. Two recent articles carry forward Professor Verkuil's analysis of the functions and institutional design mechanisms of agency independence. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (examining the ways in which institutional features other than removal restrictions—such as funding sources, qualifications for appointment, and shared authority among agencies—help to insulate agencies from capture); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 624-36 (2010) (illustrating how new financial reforms undermine traditional distinctions between independent and executive agencies through granting collaborative and cooperative authority).

rulemaking, and prosecution are "misplaced in independent agencies,"[120] Professor Verkuil wrote, because of their appropriate dependence on executive oversight and need for accountability.[121] In contrast, adjudication merits independence.[122] "Adjudication and policymaking," Professor Verkuil wrote, "call for different skills and temperaments as well as different organizational mechanisms."[123] Professor Verkuil addressed his arguments to how Congress should design agencies. *PCAOB* goes a significant step further. *PCAOB* gives these same distinctions constitutional content by making the validity of removal protection depend upon this distinction between agencies with only adjudicative functions, on the one hand, and those with policymaking and enforcement functions, on the other.

III. AGENCY INDEPENDENCE UNDER *PCAOB*'S PRINCIPLE

PCAOB thus creates two constitutionally significant types of agencies for the purposes of good-cause removal protection—dedicated adjudicators and agencies with combined functions. This new division is most readily visible with regard to officers inside independent agencies, but *PCAOB*'s logic also applies upward to single layer good-cause protections.

A. PCAOB*'s Immediate Reach*

The most pressing implications of the decision do not pertain to the fate of removal protections for officials within independent agencies, or for the civil service more generally, as Justice Breyer warned. As to those officials, *PCAOB*'s counsel is relatively clear. So long as they perform only adjudicative functions, or are not officers under the Appointments Clause, *PCAOB* preserves their removal protections. Thus, if Congress seeks to protect officers who adjudicate in independent agencies from at-will removal, it will need to sever those officers from positions in which they also have enforcement or policymaking functions. As the Board may be unique in operating with both multiple functions and under a dual level of removal protection,[124] that counsel may not reach far. The more fundamental and

120 Verkuil, *supra* note 39, at 266.

121 *Id.* at 264-65.

122 *Id.* at 262, 264-65.

123 *Id.* at 262.

124 *See* Strauss, *supra* note 99, at 2276 (noting that the PCAOB's status as something other than a "committed adjudicator" under a dual for-cause protection makes it unique).

controversial question posed by the decision is how far *PCAOB*'s principle extends upward to single-layer good-cause protections.

B. *Single Layer Removal Protections*

To understand whether *PCAOB*'s redrawing of the permissible grounds for agency independence applies to single-level removal protections, we need to understand its logic.

One way to do so is to consider the prior regime. It was premised on two important ideas. First, it assumed that when an agency engaged in adjudication, the agency's action was not only policymaking. Of course, it may involve policymaking, as discussed above, but adjudication could not be understood to *only* involve a form of policymaking or the need for independence from political superiors would vanish. Second, it assumed that protecting adjudicators' independence warranted upholding good-cause protection of their other functions so that the President (or Department Head) would not fire the official under the cover of disagreeing with his or her performance of non-adjudicative rules, but really intending to punish the official for unsatisfactory adjudicative decisions.[125] In short, adjudicative functions were treated as a sufficient basis for validating good-cause removal protections, even as to the agent's exercise of non-adjudicative functions.

Which of these premises does *PCAOB*'s principle reject? It cannot be the first premise, or *PCAOB*'s principle would be incoherent. The thought that adjudication is *only* policymaking could explain why the Board did not warrant removal protection. But it could not make sense of the principle preserving a safe harbor for the removal protections of dedicated adjudicators. If adjudication is only policymaking, the removal protections for dedicated adjudicators should go by the wayside as well.

It makes more sense, then, to view *PCAOB* as premised on a re-evaluation of the second premise. That re-evaluation surely cannot be based on a more sunny view of the purity of presidential or other principal officers' motives in firing or disciplining inferior officers. Nor can it be based on newfound optimism of the capacity of courts to ferret out true motives from purported ones in a firing decision.

It depends instead upon a different vision of the agency and reflects a different baseline for evaluating the constitutionality of agency independence. To begin with, the view of the multi-function agency has shifted. In *Humphrey's Executor*, the agency's adjudication

125 Verkuil, *supra* note 86, at 333.

had primacy, and, as noted above, the Court marginalized the FTC's enforcement powers. The opposite holds in *PCAOB*. In *PCAOB*, the agency's enforcement and policymaking took precedence, and the Court diminished the Board's adjudicative functions. The agency is no longer understood to be primarily engaged in adjudication, with rulemaking and enforcement powers largely incidental to and supportive of that adjudicative role. Instead, the multi-function agency is seen primarily as a vehicle for policy formulation through rulemaking and enforcement, with only incidental and relatively marginal adjudicative tasks. With this change in view of the agency also came a shift in the baseline for assessing removal protections. Formerly, if an agency were in for a penny of adjudication, it warranted a pound of removal protection. Now if the agency is in for a penny of enforcement and rulemaking, the executive warrants a pound of at-will removal power.

That principle has no inherent limit to dual-level removal protections. It applies just as readily to single-layer provisions. The question is whether this reversal will remain cabined in the factual context of the *PCAOB* or not. To be sure, there are several strong grounds for limiting the scope of *PCAOB*'s application. Consider two possibilities.

The first confines *PCAOB* to entities to which the APA does not apply. As helpfully highlighted by Professor Peter Strauss,[126] while the Board is a "government entity,"[127] it is not a government "agency" under the APA.[128] The Board therefore is not governed by the APA's separation of functions requirements. Although the Board's own rules include a basic separation of functions requirement,[129] the absence of the APA's (or other statutory) requirement for separation of functions

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126 Strauss, *supra* note 124, at 11.

127 *See PCAOB*, 130 S. Ct. 3138, 3147 (2010) ("the Board is a Government-created, Government-appointed entity").

128 *See* 15 U.S.C. § 7211(b) (2006) ("The Board shall not be an agency or establishment of the United States . . . . No member or person employed by . . . the Board shall be deemed to be an officer or employee . . . for the Federal Government . . . ."). The APA applies only to entities that constitute an "agency," which it defines as "authorit[ies] of the Government of the United States." 5 U.S.C. § 551(1).

129 PCAOB Rule 5200(c) provides:

> The staff of the Division of Enforcement and Investigations may not participate or advise in the decision, or in Board review of the decision, in any proceeding in which the Division of Enforcement and Investigations is the interested division, except as a witness or counsel in the proceeding. Any other employee or agent of the Board engaged in the performance of investigative or prosecutorial functions for the Board in a proceeding may not, in that proceeding or one that is factually related, participate or advise in the decision, or in Board review of the decision, except as a witness or counsel in the proceeding. A hearing officer may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Board.

BYLAWS & RULES OF THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, RULE 5200(C) (2010), *available at* http://pcaobus.org/Rules/PCAOBRules/Documents/All.pdf.

might be thought to provide a justification for the Court's insistence as a matter of separation of powers that the removal protections of dedicated adjudicators be viewed differently than those with combined functions. It might also suggest confining the *PCAOB*'s separation-of-powers insistence on separation of functions to other entities that fall outside of the APA's requirements.[130]

This is an intriguing possibility, but not one we should seize upon too quickly. Recall that the APA's separation-of-function requirements exempt agency heads.[131] Thus, even if the APA governed the Board, the Board itself would be exempt from the APA's primary requirement for separation of functions.[132] As a result, the fact that the APA does not govern the Board should not be viewed as a decisive reason, or perhaps even an opening of the door, for the Court to require the separation of functions via constitutional law, as the *PCAOB* Court does.

An alternative narrow reading of the *PCAOB*'s principle would confine its operation to officials protected by a second (or greater) level of good-cause removal protection.[133] The central thrust of the majority's opinion was that the second layer of removal protection imposed a significantly greater impediment to the President's oversight over the Board than a traditional single layer of removal protection.[134] The strongest argument for confining the application of *PCAOB*'s principle is premised on accepting the majority's view that the second layer makes a difference to the President's control. On this view, the second layer of removal protection would make it more difficult for the President to fire a Board member for impermissibly commingling functions, say, by allowing an enforcement role or contact to have undue influence on an adjudicative decision. As a result, there would be more reason for the Court to require separation of adjudicative functions from policymaking roles where the agency operates at or below a second tier of removal protection, and more reason to confine *PCAOB*'s principle to those agencies operating under two (or greater)

130 *See, e.g.*, Lebron v. Nat'l Ry. Passenger Corp., 513 U.S. 374, 392 (1995) (holding that Amtrak is not an agency under the APA but is a government entity for the purpose of determining the constitutionality of its actions).

131 5 U.S.C. § 554(d).

132 The Board's own separation of functions rule also does not apply to the Board members themselves, only to employees and other agents. *See supra* note 129 (quoting PCAOB Rule 5200(c)).

133 The argument might be augmented because the Board was subject to a demanding good-cause standard. *Compare* 15 U.S.C. § 7217(d)(3) (providing for removal only upon showing that Board member "willfully violated" the securities laws, "willfully abused" authority, or "without reasonable justification or excuse" failed to enforce securities laws), *with* 5 U.S.C. § 7521 (providing for removal of administrative law judges "only for good cause" without further specification).

134 *PCAOB*, 130 S. Ct. 3138, 3154-61 (2010).

levels of good-cause removal protection. In addition, the majority's very willingness to imply good-cause protection for the SEC despite the absence of a statutory provision for it, if only assumed for the purposes of the decision,[135] might be taken to validate the SEC's single-layer protection applicable to the full range of the SEC's functions. That implication of good-cause protection for the SEC might be viewed as one of the most significant aspects of the decision.[136]

Focus on the context of the dual layer of removal protection offers good lawyerly grounds for cabining *PCAOB*. The question is whether that limitation to second-tier removal becomes the entrenched meaning of the decision or is overtaken by the logic of *PCAOB*'s principle. The conflict is a classic one, to be resolved by some future Court. On the one hand, the principle's genesis in the peculiar context—of an agency with multiple functions operating with a dual layer of removal, combined with the implication of good-cause protection for the SEC—may define its scope. In that case, the *PCAOB* decision would have done little to unsettle institutional arrangements beyond the Board's removal protection itself. On the other hand, *PCAOB* embraces a principle—when an agency has policymaking and enforcement powers, the need for executive control trumps congressional concern for the agency's independence in its exercise of adjudicative functions—that is not inherently confined to second-layer removal provisions. Based on this principle, if the Court were to evaluate single-layer removal provisions anew, *Wiener*'s upholding of removal protection for dedicated adjudicators would stand, and *Humphrey's Executor*'s broader protection for the multitude of agencies with a combination of functions would fall.

C. *Adjudication as Policymaking?*

The appeal of *PCAOB*'s principle will depend, among many other things, on the understanding of adjudication in the executive branch. If, on the one hand, adjudication itself is viewed solely as a means of policy implementation, the extension of *PCAOB*'s principle would provide a welcome restructuring of the executive branch. It is generally acknowledged that political oversight should attach to agency policy implementation, whether one defends that view in functional terms or as a requirement of the Constitution's Article II. On the view that

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135 *Id.* at 3149.

136 *See* Beermann, *supra* note 20, at 22-23 (suggesting that the implication of a good-cause standard for the SEC may be most important part of *PCAOB* because it appears to create a quasi-constitutional presumption of independence requiring Congress to clearly specify at-will removal).

adjudication is merely a means of policy implementation, the extension of *PCAOB*'s principle to single-layer removal protections would help to close the gap between political supervision of policymaking in adjudication and rulemaking. By setting aside good-cause removal protections for multi-function agencies, *PCAOB*'s principle would put agency officials in those agencies on notice that their policymaking through adjudication will not be exempt from scrutiny. Those officials would then be answerable for policymaking through adjudication as they are for other forms of policymaking.

Interestingly, this is the accountability for adjudicative decisions the Supreme Court embraced in *Myers* (and rejected in *Humphrey's Executor* and *Wiener*). In *Myers*, the Court did not simply note that the President "may consider" an adjudicative decision as a reason for removing an officer on the ground that the decision did not "wholly intelligently or wisely" administer the statute.[137] But the Court went on: "Otherwise [the President] does not discharge his own constitutional duty of seeing that the laws be faithfully executed."[138] *PCAOB* offers a principle of agency organization for the vast majority of multi-function agencies to facilitate the President's monitoring and oversight of their adjudicative activities. In short, at-will removal protection applicable to executive functions would also apply to the agency's exercise of adjudicative tasks.

If, on the other hand, adjudication in the executive branch is understood to be answerable to a distinct set of decisional norms associated with due process,[139] and not solely an exercise of policy execution, *PCAOB*'s principle has a different import. On this view, when Congress grants good-cause protections to agencies with adjudicative functions, it aims to implement due process values of independence of the decider. From this perspective, the danger of *PCAOB*'s principle is that it undermines Congress's power to provide good-cause removal protection to agencies which possess adjudicative as well as other functions. That, in turn, may encourage members of multi-function agencies to view adjudication as if it were only another policymaking forum in which they are answerable to political superiors.

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137 Myers v. United States, 272 U.S. 52, 135 (1926); *see also supra* text accompany notes 89-90 (discussing this aspect of *Myers*).

138 *Id.*

139 I make a preliminary gesture toward the idea that due process may not only impose procedural requirements but also distinct interpretive constraints on statutory interpretation by agencies in Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225.

CONCLUSION

Separation of powers has a new endeavor. The *PCAOB* decision makes the validity of good-cause removal protections depend on the separation of adjudicative from policymaking and enforcement functions within the agency. At a minimum, within independent agencies, it preserves the second layer of removal protection only for dedicated adjudicators. But its logic extends further. In *PCAOB*, the demand for political supervision over rulemaking and enforcement trumped Congress's choice to preserve the independence of officials who perform those roles and also adjudicate. In that way, *PCAOB* reversed the consistent constitutional validation of good-cause removal protections for those who engage in adjudication. While *PCAOB* might well be confined to two (or greater) levels of good-cause removal protection, it has the potential to restructure the constitutional footing for agencies with a single level of good-cause removal protection, preserving that protection for dedicated adjudicators but casting it aside for agencies with more than just adjudicative functions.